UNITED NATIONS

AT

Administrative Tribunal

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AT/DEC/534
29 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 534

Cases No. 502: ROSSMAN
No. 503: SABBARESE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Ioan Voicu;

Whereas at the request of Roslyn Rossman, a former staff member of the United Nations, and of Rita Sabbarese, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 October 1988 and 30 November 1988 the time-limit for the filing of applications to the Tribunal;

Whereas, on 30 November 1988, the Applicants filed applications which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicants, after making the necessary corrections, again filed the applications on 27 February 1989;

Whereas the applications contained the following pleas:

"II. Pleas

The Administrative Tribunal is respectfully requested to rule that:

the 1979 promotion review from G-5 to the professional category should have been held;

Applicant[s] had the right to be reviewed at that time;

> corrective action is required, at this time, in the form of submission by the Secretary-General of the two cases to the appropriate promotion body."

Whereas the Respondent filed his answers on 9 March 1989;

Whereas the Applicants filed written observations on 9 June 1989;

Whereas Ms. Sabbarese submitted additional statements and additional documents on 5 January and 17 October 1991;

Whereas Ms. Rossman submitted an additional statement on 6 January 1991;

Whereas the facts in the two cases are as follows:

Ms. Rossman received a permanent appointment with the United Nations as a Secretary at the G-3 level on 17 May 1954. She was promoted to the G-4 level on 1 January 1958 and became an Administrative Clerk on 17 October 1961. She was promoted to the G-5 level as an Administrative Assistant on 1 January 1968 and retired on 31 August 1985.

Ms. Sabbarese received a permanent appointment with the United Nations as a Clerk at the G-3 level on 1 September 1967. She was promoted to the G-4 level as a Senior Coding Clerk on 1 July 1969 and to the G-5 level as a Principal Codifier on 1 April 1975. She became a Principal Finance Clerk on 15 December 1975 and an Administrative Assistant on 16 October 1978.

In their performance reports, both Applicants received the highest or the second highest over-all rating.

On 20 December 1978, at its thirty-third session, the General Assembly adopted resolution 33/143 and requested the Secretary-General, in Part I, paragraph (g), to adopt measures to ensure that

> "Movement of staff from the General Service category to the Professional category should be limited to the P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for

> appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years' experience and post-secondary educational qualification."

In order to implement General Assembly resolution 33/143, on 29 August 1979 the Secretary-General established in Bulletin ST/SGB/173 a new system for promotion of staff members from the General Service to the Professional category that involved a competitive examination. On the same date, the Assistant Secretary-General for Personnel Services issued Administrative Instruction ST/AI/268 in which he set forth the procedures that would govern the new system. Later, on 10 March 1981, as a result of Administrative Tribunal Judgement No. 266, Capio against the Secretary-General of the United Nations, the Assistant Secretary-General for Personnel Services issued Information Circular ST/IC/81/19 on "Review of General Service staff members recommended for promotion to the Professional category for the 1979 Register". The circular provided that staff members in the General Service category who had been assigned the functions of a Professional post and for whom the department or office concerned had prepared recommendations prior to Bulletin ST/SGB/173 and Administrative Instruction ST/AI/268 of 29 August 1979 were entitled to be considered for promotion from the General Service category to the Professional category without a competitive examination.

On 14 August 1981 the Applicants, on their own behalf and on behalf of the other G-5 staff members at New York who, "having the required seniority in the grade on 1 January 1979", were "entitled to be reviewed for promotion to the P-2 level", wrote to the Secretary-General to express their deep concern that, in his efforts to implement General Assembly resolution 33/143, they had "been denied rights established by the Charter, as well as those acquired under the Staff Rules and the practices of the United Nations regarding promotion". They proposed that the Secretary-General, in the exercise of his discretion to select

appropriate competitive methods for promotion, consider several measures to complement the steps already taken to implement the resolution of the General Assembly. These proposals included the establishment of a special promotion review for all G-5 staff who on 1 January 1979 had the required seniority to be reviewed under the old system, regardless of whether they had ever been recommended for promotion. In a letter dated 19 October 1981, the Assistant Secretary-General for Personnel Services replied that the request for a special promotion review procedure could not be favourably considered, particularly since, in its resolution 35/210 of 17 December 1980, the General Assembly had reiterated its earlier recommendation and strengthened it by stating that movement of staff from the General Service category to the Professional category was to be regulated exclusively through competitive examination under the conditions outlined in the earlier resolution and that no exceptions were to be authorized.

On 11 January 1982 the Applicants requested to be permitted to waive proceedings before the Joint Appeals Board and to present directly to the Tribunal their claim that they were denied their acquired rights on the basis of an incorrect interpretation of the judgement rendered by the Tribunal in the Capio case. Their request was subsequently denied on the ground that resolution of their cases required a factual determination that they had been assigned to or had performed professional functions before the institution of the examination procedure, or had been recommended for promotion before the start of that procedure, and therefore that they did, in fact, fall within the transitional measures.

On 19 and 30 December 1985 respectively, Ms. Rossman and Ms. Sabbarese submitted statements of appeal to the Joint Appeals Board. The Board submitted its report on 4 May 1988. The Board's conclusion and recommendation read as follows:

"Conclusion and recommendation

37. The Panel concluded that neither Ms. Rossman nor Ms. Sabbarese were among the persons identified by circular ST/IC/81/19 and that therefore under the law on acquired rights as laid down by the Administrative Tribunal neither appellant had a right to be considered for promotion to the Professional category under the method prevailing before the introduction of the system of competitive examinations.

38. In view of the above conclusion, the Panel finds itself unable to make a recommendation in favour of the appeal."

On 11 May 1988 the Under-Secretary-General for Administration and Management informed the Applicants that the Secretary-General, having re-examined their cases in the light of the Board's report, had decided to maintain the contested decisions. On 27 February 1989 the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants were denied their right to review for promotion from the General Service to the Professional category in 1979 contrary to the principle of acquired rights.

2. The establishment of a new system for promotion did not provide adequate means of protection of their duly acquired rights.

Whereas the Respondent's principal contentions are:

1. For the reasons stated in the conclusion of the Joint Appeals Board, the rights of the Applicants were not violated.

2. The new procedure did not violate the acquired rights of staff, and the Applicants' situation is clearly distinguishable from that of Capio.

The Tribunal, having deliberated from 15 to 29 October 1991, now pronounces the following judgement:

I. Since the applications filed by the two Applicants are similar, the Tribunal decides that they should be joined and disposed of in a single judgement.

II. The Tribunal finds that there is no dispute between the parties as to the facts of the two cases, which were properly established by the Joint Appeals Board.

III. The first legal question to be decided by the Tribunal is whether the Joint Appeals Board has correctly interpreted Information Circular ST/IC/81/19 of 10 March 1981 in finding that the two Applicants, who had an excellent record of performance, were not among the persons identified by that circular and that therefore under the law on acquired rights as laid down by the Tribunal neither Applicant had a right to be considered for promotion to the Professional category under the method prevailing before the introduction of the system of competitive examinations pursuant to General Assembly resolution 33/143 of 20 December 1978.

IV. The Tribunal notes that the Joint Appeals Board made a detailed analysis of the applicability of Information Circular ST/IC/81/19 in the light of the judgements rendered by the Tribunal, after the introduction of the system of competitive examinations, regarding claims of staff members in the General Service category for promotion to the Professional category without taking a competitive examination. In this respect, the Joint Appeals Board made appropriate references to Judgements No. 266, Capio (1980), No. 295, Sue-Ting-Len (1982), No. 296, Sun (1982), No. 311, Schurz (1983) and No. 342, Gomez (1985).

V. After a thorough consideration of the present cases, the Panel of the Joint Appeals Board reported as follows:

> "31. The Panel considered that it would be going contrary to the above judgements of the Administrative Tribunal if it were to accept the contentions of the appellants that they had an acquired right to be considered for promotion under the pre-1979 system by the mere fact that by the end of 1978, they had the required seniority to be considered for promotion under that system. In the view of the Panel, the judgements of the Tribunal rendered after the issuance of information circular ST/IC/81/19 made clear that, according to the Tribunal, an acquired right to be considered for promotion outside the examination procedure exists only in cases which fall within the terms of that circular. It was true that in the only one of those cases in which the appellant prevailed, that of Sun, the precise terms of this circular were not met. However, in that case, the Tribunal had considered that these terms would have been met but for the fact that an official had not taken an action expected of him for reasons unrelated to the case of the Applicant. Thus, the Panel concluded that the law as laid down by the Tribunal is that acquired rights can be claimed only if the terms of ST/IC/81/19 are met or if the circumstances in an appellant's case are such that he or she clearly belongs to the class which the circular intended to identify though because of some entirely fortuitous circumstances this identification was not completed. The Panel found that neither Ms. Rossman's nor Ms. Sabbarese's case were in that class."

VI. The Tribunal subscribes to this paragraph of the report of the Joint Appeals Board and on the basis of the same considerations finds that the two Applicants are not entitled to the benefits of the information circular mentioned above as it appears that they had not been assigned the functions of a professional post and that their departments had made no recommendations for their promotion prior to the issuance of Bulletin ST/SGB/173 and Administrative Instruction ST/AI/268.

VII. The Tribunal cannot concur with the view expressed by the Applicants that since they had attained the required seniority

and had the desired level of performance their cases should have been duly reviewed by the Appointment and Promotion Board, irrespective of whether there was a departmental recommendation or not.

VIII. In fact, the text of Information Circular ST/IC/81/19 is clear in this regard and concerns the "review of General Service staff members recommended for promotion to the Professional category for the 1979 register" (emphasis added). It relates to staff members in the General Service category "who had been assigned the functions of a Professional post and for whom the department or office concerned had prepared recommendations prior to the issuance of the Secretary-General's Bulletin ST/SGB/173 and Administrative Instruction ST/AI/268 of 29 August 1979" (emphasis added).

IX. As to the contention of one of the Applicants (Ms. Sabbarese) that the principle of "collateral" cannot be denied, the Tribunal refers to its own jurisprudence and, as it did in Judgement No. 342, Gomez (1985), para. VII,

> "... reiterates its rejection, as in Judgement No. 311, paras. VI-VIII (Schurz, 1983), of any theory that 'collaterals' should be regarded as having an acquired right to be considered for promotion when, as a matter of fact, they had not been so recommended by their respective departments."

X. In conclusion, the Tribunal cannot find in the present cases a legal basis for the promotion of the two Applicants to the Professional category and, therefore, cannot order any corrective action to be undertaken by the Respondent.

XI. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Ioan VOICU
Member

New York, 29 October 1991

Jean Hardy
Acting Executive Secretary